

V. Department of Justice -- Matthew Frank, Administrator, Legal Services Division

The department requests a supplement of \$447,000 GPR in FY97 from the Committee's appropriation under s.20.865(4)(a) to the legal expenses appropriation under s.20.455(1)(d) to provide additional funding for the department's expenses in the prosecution and defense of actions or proceedings in which the state is a party or may have an interest.

Governor's Recommendation

Approve a reduced supplement of \$287,000 GPR for FY97 and require the department to submit a plan to the Joint Committee on Finance for its June, 1997 s. 13.10 meeting identifying possible internal reallocations, case account encumbrances which could be delayed until FY98, and other alternatives for solving the remaining projected deficit.

**CORRESPONDENCE MEMORANDUM****STATE OF WISCONSIN**  
**Department of Administration**

**Date:** March 27, 1997

**To:** Members, Joint Committee on Finance

**From:** Mark D. Bugher, Secretary  
Department of Administration

**Subject:** Section 13.10 Request from the Department of Justice for Legal Expenses.

**Request**

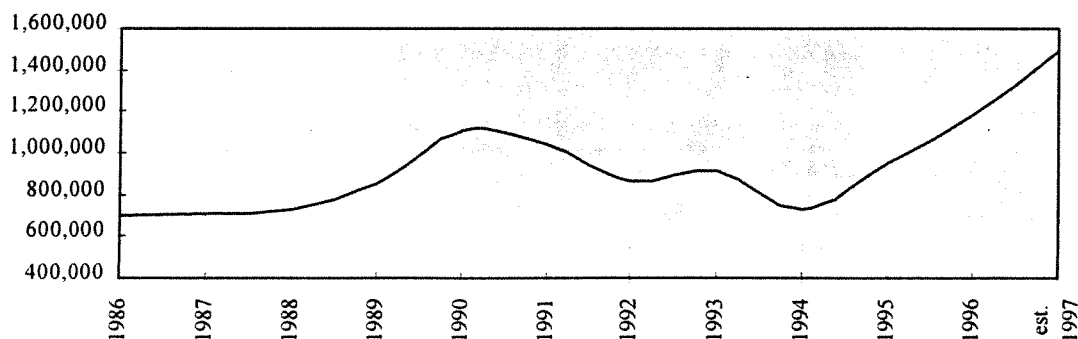
The Department of Justice requests a supplement of \$447,000 GPR in FY97 from the Joint Committee on Finance appropriation under s. 20.865(4)(a) to the legal expenses appropriation under s. 20.455(1)(d) to provide additional funding for the department's expenses in the prosecution and defense of actions or proceedings in which the state is a party or may have an interest.

**Background**

The legal expenses appropriation, also known as the "case account," is a biennial GPR appropriation which funds expenses associated with representing the state in lawsuits. Case-related costs such as consultant fees, expert witness fees, travel for trials, transcripts and filing fees are paid from this appropriation.

Expenditures from the legal expenses appropriation have varied considerably in the past ten years. As Chart 1 indicates, from approximately \$700,000 in FY86, expenditures peaked in FY90 at approximately \$1.1 million. Between FY90 and FY94, expenditures decreased significantly, then began rising again. The department estimates legal expenses total expenditures will reach a 10-year high of \$1,489,700 in FY97.

Chart 1: Legal Expenses Actual Expenditures (FY86-est.FY97)



Prior to the 1981-83 biennial budget, DOJ's legal expenses appropriation was a GPR sum sufficient. The 1981-83 budget changed it to a sum certain, biennial appropriation. Between the time of that conversion and December 1992, DOJ made regular s. 13.10 requests for supplements to the legal expenses appropriation. Table 1 illustrates the GPR supplements provided and internal transfers authorized regarding this appropriation.

Table 1: Supplements and Transfers to the Legal Expenses Appropriation

| <u>Biennium</u> | <u>Supplements</u> | <u>Transfers</u> | <u>Total</u> |
|-----------------|--------------------|------------------|--------------|
| 1981-83         | \$140,000          | \$ 0             | \$140,000    |
| 1983-85         | 150,900            | 37,500           | 188,400      |
| 1985-87         | 189,000            | 0                | 189,000      |
| 1987-89         | 220,200            | 0                | 220,200      |
| 1989-91         | 0                  | 561,500          | 561,500      |
| 1991-93         | 226,000            | 93,100           | 319,100      |
| 1995-97         | 92,800             | 220,000          | 312,800      |

During the 1993-95 budget negotiations, \$122,800 GPR was added to the case account base, increasing the annual expenditure authority from \$767,600 to \$890,400. The budget also transferred \$110,200 GPR annually for LTE expenses to the legal services general operations appropriation. These two measures provided added resources and flexibility for the legal expenses appropriation. This request is the second for a supplement to the case account since passage of the 1993-95 budget (1993 Wisconsin Act 16). This request re-establishes the need for the \$287,200 which DOJ did not receive in its November 18, 1996 s.13.10 request for \$600,000, and it identifies \$159,800 in additional case account needs since the November request.

The department projects FY97 case account expenditures of \$1,489,700, bringing total 1995-97 expenditures to \$2,676,300. As Table 2 illustrates, based on these projections, the legal expenses appropriation would incur a projected deficit of \$447,500.

Table 2: Current Status of 1995-97 Legal Expenses Appropriation (Biennial)

|                                       |             |
|---------------------------------------|-------------|
| Budget Authority*                     | \$1,916,600 |
| FY96 Actual Expenditures              | 1,186,600   |
| FY97 Projected Expenditures           | 1,489,700   |
| Total Actual + Projected Expenditures | (2,676,300) |
| Projected Deficit                     | (447,500)   |

\*Includes \$1,797,600 Chp. 20 authority plus an encumbrance of \$119,000 carried from the 1993-95 biennium

### Analysis

Accurately budgeting for the legal expenses appropriation is difficult because the department cannot predict the number, type and complexity of cases in which it may become involved. Since the November 18, 1996 s.13.10 request, new caseload with significant case account expenditures has been added, some cases will require more in case account expenditures than anticipated and others will require less. While the \$312,800 provided to DOJ during the December 1996 s.13.10 process addressed immediate concerns for that quarter, it will not be sufficient to cover necessary costs for the remainder of FY97.

During the 1995-97 biennium, the use of expert witnesses in four cases has resulted in significantly greater expenditures than could have been anticipated. Four cases mentioned in the November request remain the focal point of extraordinarily high expenditures. Listed with the amounts spent to date, they are: 1) Menominee Tribe of Indians v. State of Wisconsin, et al, regarding treaty rights (\$322,000); 2) NAACP v. Thompson, regarding voting rights (\$100,400); 3) Karlin v. Foust, regarding the recently enacted 24-hour waiting period for abortions (\$159,700); and 4) Vincent v. Voight, challenging the 1995-97 budget item appropriating GPR through the school aids formula for property tax relief (\$63,900). Expenditures for just the expert witnesses in these four cases alone total \$646,000 to date -- fully one-third of the department's total case account budget authority for the biennium.

The measures enacted in the 1993-95 budget provided increased resources and flexibility to DOJ regarding the case account. In nearly four years the appropriation has contained sufficient funds to reimburse expert witnesses and provide all other necessary services. Absent the significant expert witness expenditures related to the four cases noted above, the department would likely be able to address its 1995-97 needs within existing base resources. It is clear that costs associated with these cases represent extraordinary burdens on the legal expenses appropriation and that additional resources are necessary for the department to continue litigating current open cases.

The Menominee case was dismissed September 16, 1996 by federal district Judge Crabb, and the tribe's motion for reconsideration was denied November 15, 1996. The department anticipates needing another \$25,000 from the case account in costs associated with the tribe's appeal to the U.S. Seventh Circuit Court of Appeals.

New needs for expert witnesses in ongoing cases and experts needed for two new cases explain most of the need for \$97,600 in additional expert witness expenditures beyond those listed in the November 1996 request. First, in Amsoil v. Koran, Amsoil, Inc. is suing various Department of Agriculture, Trade and Consumer Protection (DATCP)

employees for \$8 Million regarding permits to sell fertilizer. For this case the department estimates \$45,000 more for witnesses than in its earlier s.13.10 request. Two new cases involving the training of correctional officers and an injury claim resulting from an accident involving a state vehicle will result in approximately \$30,000 in expert witness expenditures for FY97.

The department has provided additional information regarding the status of purchase orders and contracts with expert witnesses. Understanding the variability of each case, the department reduces by 50% estimates of expenditures for cases where there is a signed contract with no purchase order and cases with no contract or purchase order. These reductions are internal recognitions that not all cases may be settled during FY97 and represent a good faith effort to do more than simply request every dollar which may be needed.

In a March 3, 1997 memorandum, the department identified \$320,000 in possible expert witness expenditures where no contract has been signed and no purchase order issued. Legal Services Division managers reduced this by 50% to arrive at a cost estimate of \$160,000 for FY97. Given that no contract has been signed and no purchase order created, it is reasonable to reduce the department's request by \$160,000 and wait until the June, 1997 s.13.10 meeting to determine if this amount is still needed. All other components of the department's request are justified and recommended at this time.

### **Recommendation**

Approve a reduced supplement of \$287,000 GPR for FY97 and require the department to submit a plan to the Joint Committee on Finance for its June, 1997 s. 13.10 meeting identifying possible internal reallocations, case account encumbrances which could be delayed until FY98, and other alternatives for solving the remaining projected deficit.

Prepared by: Scott Aker  
267-0370



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

JAMES E. DOYLE  
ATTORNEY GENERAL

Burneatta L. Bridge  
Deputy Attorney General

123 West Washington Avenue  
P.O. Box 7857  
Madison, WI 53707-7857

James E. Doyle  
Attorney General  
608/266-1220

February 26, 1997

Senator Brian Burke, Co-Chair  
Representative Scott Jensen, Co-Chair  
Joint Committee on Finance  
Room 113 South, State Capitol  
Madison, Wisconsin 53702

Dear Senator Burke and Representative Jensen:

Under sec. 13.10, Stats., the Department of Justice requests a supplement of \$447,000 in FY '97, from the appropriation under sec. 20.865(4)(a), to the "Legal Expenses" appropriation under sec. 20.455(1)(d). Case-related costs, incurred in representing the state's legal interests, will consume the amount provided for this purpose, by April 1, 1997. Unless a supplement is provided, we will have to cancel contracts for expert witnesses, and curtail our representation of the state's legal interests, for the last three months of FY '97.

This request meets the three criteria under sec. 13.101(3)(a), Stats. First, an emergency exists, given that the Department lacks the funding needed to pay all FY '97 case-related costs of defending or prosecuting cases. Second, the Legal Expenses appropriation is fully committed at this time, and there are no other funds available to the Department to cover case-related costs. Third, the purposes for which a supplement is requested have been authorized by the Legislature.

Background

The Legal Expenses, or "Case Account," appropriation under sec. 20.455(1)(d), Stats., pays for costs incurred in prosecuting or defending actions where the state has an interest. Costs of experts, court reporters, transcripts, copying, court costs, witness fees, and attorney travel are charged to this appropriation. Prior to 1982, Case Account was a sum-sufficient appropriation. As such, case-related costs were recognized as essentially uncontrollable and unpredictable, and yet unavoidable in meeting the legal interests of the state. Case Account has required an increase in virtually every biennium, since being converted to a sum-certain appropriation.

On November 18, 1996, the Department requested a supplement of \$600,000 to the Case Account appropriation. On December 16, 1996, the Joint Committee on Finance authorized a supplement of \$92,800, and the use of \$220,000 in legal settlement funds. The additional

\$312,800 will be enough to pay case-related costs into March, 1997. However, this increase fell \$287,200 short of the amount we had requested, and will not cover expenses for the last quarter of FY '97.

### Analysis

As we have seen over the years, the Department has very little ability to control or even predict case-related costs likely to occur in any given year, for at least three reasons. First, we have essentially no discretion regarding whether or not to defend cases, and only limited discretion involving prosecutions. Second, no one can predict the number, complexity or costs of cases to be seen in the future, although the budget process requires that we try to do so. Third, expenses vary dramatically for different cases, depending on the need for experts, the volume of transcripts and other documents, and other factors.

When we submitted our November, 1996 request, we had only four full months of fiscal information for FY '97. We now have seven months worth of data. As a result, we have even more confidence in our current estimates, and our need for \$447,000 in additional funding. We estimate that expenses for experts will be higher than anticipated, because of increased activity and new contracts in cases on hand in November, 1996; and, because of new cases which have emerged in the last three months which require experts. In addition, we know that other, "non-expert" costs will also be higher than we were able to estimate three months ago.

Table 1 shows Case Account spending in several broad categories since FY '94, including an estimate of spending likely to occur in '97.

Table 1  
Case Account Spending  
FY '94 to FY '97

| <u>Category</u>        | <u>FY '94</u>  | <u>FY '95</u>  | <u>FY '96</u>  | <u>FY '97</u>  |
|------------------------|----------------|----------------|----------------|----------------|
| Experts                | \$ 90,927      | \$270,658      | \$ 514,122     | \$ 757,608     |
| Filing & Other Fees    | 251,180        | 210,526        | 253,538        | 240,000        |
| Data Processing        | 106,019        | 121,556        | 104,767        | 136,000        |
| Travel                 | 97,797         | 96,686         | 110,943        | 109,300        |
| Telecommunications     | 36,320         | 48,811         | 44,237         | 46,000         |
| Postage & Freight      | 42,442         | 59,475         | 51,134         | 54,500         |
| Other Supplies & Serv. | <u>108,241</u> | <u>146,843</u> | <u>107,871</u> | <u>146,300</u> |
| TOTAL                  | \$732,926      | \$954,555      | \$1,186,612    | \$1,489,708    |
| Monthly Average        | \$61,077       | \$79,546       | \$98,884       | \$124,142      |

Table 1 shows that we expect to spend about \$1.5 million in FY '97 for case-related expenses (including \$220,000 in settlement funds). This estimate is based on experience through January 31, 1997, and on our Internal Operating Budget system, which closely tracks expenditures at a very detailed level.

How does the FY '97 cost estimate compare to the resources provided for case-related expenses? As shown in Table 2 below, \$1,042,218 is available for FY '97 Case Account expenses. As of January 31, 1997, expenditures and encumbrances totaled \$846,818. As a result, only \$195,400 was available for all new case-related obligations after January 31, 1997. Based on our estimate that average monthly spending in '97 will exceed \$124,000, current resources will carry us only into March, leaving about three months of needs unfunded.

In fact, the situation is worse than current expenditure and encumbrance figures suggest. Encumbrance figures do not reflect all of the amounts which we are obligated to pay for services already received but for which we have not yet been billed. Typically, funds would be encumbered, or held, to pay for services which we know we will receive, but for which we have not yet been billed. However, because the Case Account has been so short, we have had to keep encumbrances to a minimum, so that we could pay bills already on hand.

The fact is that we expect to spend about \$359,300 for experts and \$401,800 for other case-related costs, between February 1 and June 30, 1997. As of February 1 there were \$195,400 in uncommitted funds, and \$118,167 encumbered, or reserved, to pay some of the expenses yet to be incurred. The combination of these two--\$313,567--falls far short of the \$761,100 amount needed to carry us through the end of the fiscal year.

In simplest terms, we are now projecting a shortage of \$447,490 for FY '97. This represents the difference between the estimated cost--\$1,489,708--in Table 1, and the '97 budget of \$1,042,218 from Table 2. This is the basis for our request for a supplement of \$447,000.

Why are we in this situation? Because we have had to spend an unprecedented amount for experts during this biennium. Table 2 helps to illustrate this problem.



Table 2  
Expert Services and Total Spending  
FY '94 through FY '97

|                                   | <u>FY '94</u> | <u>FY '95</u> | <u>FY '96</u> | <u>FY '97</u> |
|-----------------------------------|---------------|---------------|---------------|---------------|
| Total Budget                      | \$ 934,934    | \$1,110,856   | \$1,267,229   | \$1,042,218   |
| Total Spent                       | \$ 732,926    | \$ 954,555    | \$1,186,612   | \$1,489,708   |
| Spent on Experts                  | \$ 90,927     | \$ 270,658    | \$ 514,122    | \$ 757,608    |
| Experts as % of<br>Total Spending | 12.4%         | 28.3%         | 43.3%         | 50.8%         |

Table 2 includes the \$312,800 provided by the Committee in December, 1996, and assumes that our request for an additional \$447,000 will be approved. If so, then about half of FY '97 case-related spending will be for experts.

Because of the cost involved, it is important to understand the process we follow when reviewing the use of expert witnesses. Several internal approvals are needed before a contract can be executed for expert services. Attorneys assigned to each case make the initial determination as to whether an expert witness is warranted, which expert might be best suited for the case, and the costs which might be incurred. The attorney submits this information to the supervising Unit Director for review and approval. If approved at this level, the request goes to the Administrator of the Legal Services Division. If approved by the Administrator, the attorney secures a contract with the expert, establishing the terms under which services are to be provided. The Department's Fiscal Services Section processes payments to the expert, when requested by the attorney and the Division's Administrative Officer, as the terms of the contract are met.

Many of our cases require the use of experts. Examples include cases involving control over state resources, exposure to liability-related losses, and policy initiatives of importance to the Governor or Legislature. The outcomes of these types of cases often hinge on the testimony of expert witnesses. Experts retained by our opponents in these cases must be countered by experts supporting the state's position.

Experts are requiring a growing share of the Case Account budget. We contracted with 33 experts in FY '96, and have issued 52 purchase orders for experts so far in '97. We have already spent \$398,308 in '97, and expect to spend as much as \$153,600 more for purchase orders already in effect. We have approved 13 other contracts, which would cost an estimated \$45,400, but have not issued purchase orders because of the funding shortage. We have 30 cases currently underway which call for experts, but we have issued neither contracts nor purchase orders because we lack the estimated

\$160,300 in needed funding. It is important to note that these estimates have been reduced from the amounts originally requested by attorneys in Legal Services, to reflect the likelihood that some cases will settle or otherwise be resolved without needing experts to the extent initially assumed. To summarize, we feel we need to spend \$359,300 or so for experts yet in FY '97 to properly defend and prosecute some of our current cases.

Why such a need for experts? To a great extent, the answer can be seen in the scope and complexity of many of the cases we have handled during this biennium. We have spent more than \$645,000 for experts in just four cases, with the Menominee case accounting for half of this amount. The cases in question, and amounts spent for experts during this biennium, are:

1. Menominee Indian Tribe vs. State, et. al.--More than \$322,000 has been spent in this case involving tribal claims on state resources and sovereignty.
2. Karlin vs. Foust--Spending for experts has exceeded \$159,700 in this case dealing with the 24-hour waiting period for abortions.
3. NAACP vs. Thompson--Experts have cost more than \$100,000 in this case relating to voting rights.
4. Vincent vs. Voight--More than \$63,900 has been spent, and we expect to spend an additional \$50,000, for experts in this case involving a constitutional challenge to the portion of the Governor's 1995-97 budget bill which appropriated General Purpose Revenues through the school aids formula for property tax relief.

Significant issues are also involved in numerous other cases where experts have been hired, or are still needed. At stake are issues relating to medical malpractice, environmental pollution, antitrust, general liability of state employees and officials, and criminal and sexual predators. Our need for experts, and for funding to pay for them, has continued to grow through this biennium.

We have no other appropriations which could be reduced, to help offset the increase needed for Case Account. In ten separate Decision Items, 1995 Wisconsin Act 27 reduced our FY '97 GPR appropriations by more than \$1.3 million, not including cuts under decisions affecting consumer protection, public intervenor, or policy analysis. Other GPR appropriations across the Department, and not just Case Account, may come up short in '97. If our remaining Case Account problem is to be addressed, then a supplement is needed, because there is nowhere else to turn.

February 26, 1997  
Page 6

The Legal Services general program operations appropriation is a particularly telling example. This appropriation includes \$589,668 for supplies and services. Unfortunately, this appropriation is responsible for \$691,000 in space rental payments to the Department of Administration. In this instance, we owe more for space rent than the amount available for even this one cost category, obviously leaving nothing for other costs such as telephones, office supplies, etc.

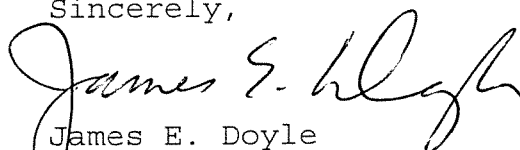
#### Summary

The summary from our November 18, 1996 request applies to this request, as well. As attorney for the state, our job, and our ethical responsibility, is to provide the most effective possible legal representation. We are called on both to defend and to prosecute a variety of very complex cases. Some we must defend, so that the state's resources are not diminished. Other cases reflect controversial policy issues of importance to the Governor and the Legislature. Effective representation often includes the use of experts. Having made a sound professional judgment that special expertise is needed in particular cases, we would be highly remiss if we did not retain the experts necessary to serve our client's cause.

The Case Account budget is always difficult to manage. We were able to keep expenses well below budget during the last biennium, but extraordinary expenses will prevent that from occurring in this biennium. The action taken by the Committee on December 16, 1996, will enable us to continue our legal work into March, 1997. We greatly appreciate what the Committee did at that time. However, we have much more work to do yet in FY '97, and face a three month funding gap, if additional resources are not provided to cover case-related expenses.

As noted in our November, 1996 request, attending to the state's legal interests costs money. We need to pay for experts, court reporters, transcripts, copying, court costs and fees, and attorney travel. The only way to avoid these costs is to avoid taking cases altogether. Doing so would be unacceptable. Allowing an inadequate budget to dictate, or even influence, our approach to defending and prosecuting cases would be extremely short-sighted. We ask, once again, that resources be provided, building on the action taken in December, 1996.

Sincerely,

  
James E. Doyle  
Attorney General